

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	
Application for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Illinois Public Utilities Act, to Construct, Operate, and Maintain a new 345 kilovolt transmission line in Ogle, DeKalb, Kane and DuPage Counties, Illinois	Docket 13-0657 On Rehearing

**ORDER ON REHEARING**

\_\_\_\_\_, 2015

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<b>ORDER ON REHEARING</b>	

By the Commission:

**I. Procedural History**

On December 2, 2013, Commonwealth Edison Company (“ComEd” or “Company”) filed a Verified Petition (“Petition”) and testimony in support of a Certificate of Public Convenience and Necessity (“CPCN” or “Certificate”) to install, operate, and maintain an overhead 345 kilovolt (“kV”) electric transmission line in Ogle, DeKalb, Kane, and DuPage Counties, pursuant to Section 8-406.1 of the Illinois Public Utilities Act (“PUA” or “Act”), 220 ILCS 5/8-406.1. ComEd also requested a Commission Order pursuant to Sections 8-406.1 and 8-503 of the Act, 220 ILCS 5/8-406.1 and 220 ILCS 5/8-503, authorizing or directing ComEd to construct the transmission line and related facilities. ComEd refers to the proposed line and related work as the Grand Prairie Gateway Transmission Line Project (“Grand Prairie Gateway Project,” “Project,” or “GPG”). (Petition, 1.) On October 22, 2014, the Commission approved the Project and

the primary route that ComEd proposed in its initial filing with a few adjustments. (the "Approved Route"). Commonwealth Edison Co., ICC Order Docket No. 13-0657, 26-37 (Oct. 22, 2014) ("October 22 Order").

On November 20, 2014, the Muirhead Group ("MG") filed a Motion for Rehearing and/or to Correct Record Regarding FPDKC Adjustment ("MG Motion") which argued for the already rejected FPDKC Adjustment. (See generally, MG Motion.) The Commission granted the MG Motion, over the objection of Ellen Roberts Vogel on November 25, 2014. (Notice of Commission Action, Nov. 26, 2014.)

The following parties filed direct testimony on rehearing in this matter: ComEd (ComExs. 35.0 – 35.02, 36.0), Staff (ICC Staff Ex. 5.0), MG (Direct Testimony of John F. Cash, Exs. A - I), Ellen Roberts Vogel (Vogel Exs. 2.0 – 2.1), Michael Petersdorf (Petersdorf Exs. 1.0 – 1.2), the Kane County Forest Preserve District ("FPDKC") (Direct Testimony of Monica Meyers on Rehearing). ComEd filed supplemental direct testimony on rehearing (ComEd Exs. 37.0 – 37.03, 38.0 CORR. – 38.02). The following parties filed response testimony on rehearing: MG (Response Testimony of John F. Cash), Michael Petersdorf (Petersdorf Exs. 2.0 – 2.1), and Ellen Roberts Vogel (Vogel Ex. 3.0). ComEd filed rebuttal testimony on rehearing (ComEd Exs. 39.0, 40.0.).

An evidentiary hearing was held on February 19, 2015, and the record was marked "heard and taken." Initial Briefs were filed by ComEd, Staff, Michael and Sarah Petersdorf and Ellen Roberts Vogel, and MG on March 3, 2015.

Reply Briefs were filed by \_\_\_\_\_, \_\_\_\_\_, as well as Michael and Sarah Petersdorf and Ellen Roberts Vogel on March 10, 2015.

## **II. Background of Rehearing**

This Rehearing began when MG filed a Motion for Rehearing and/or to Correct Record Regarding FPDKC Adjustment and the same was granted. In rehearing, the Parties have debated the merits of the Approved Route, the adjustment advocated for by the Forest Preserve District of Kane County in the initial docket (the “FPDKC Adjustment”), and ComEd’s Conditional Rehearing Alternative. All of these routing alternatives are in the area of Plato Center and Muirhead Springs Forest Preserve.

## **III. Propriety of Rehearing**

- A. ComEd’s Position
- B. Staff’s Position
- C. Petersdorfs’ & Vogel’s Position

Michael Petersdorf, Sarah Petersdorf, and Ellen Roberts Vogel (collectively, the “SP Parties”) assert that, as a threshold issue, no routing alternatives can be considered because the rehearing should not have taken place. SP Parties’ I.B., pp. 1-2. The SP Parties point out that no member of MG submitted testimony or argued for the FPDKC Adjustment during the original proceedings, despite having the factual bases for that advocacy before direct testimony was due in the original proceedings. Tr. at 134:22-135:15.

The SP Parties argue that, pursuant to the Commission’s Rules of Practice, applications for rehearing “shall contain . . . an explanation why such

evidence was not previously adduced.” 83 Ill. Admin. Code §200.880(a). The SP Parties point out that no such explanation was provided in the MG Motion for Rehearing and/or to Correct Record Regarding FPDKC Adjustment, and as such, it was improper to grant the same. Motion for Reh’g and/or to Correct Record Regarding FPDKC Adjustment (Nov. 20, 2014). The SP Parties further assert that MG’s failure to do so is inexcusable, because the evidence was known, and simply sat on. SP Parties I.B. on Reh’g, p. 4.

D. Muirhead Group Position

E. Commission Analysis and Conclusion

Upon a thorough review of the record, the Commission finds that the Muirhead Group did fail to comply with Section 200.880 of the Rules of Practice. 83 Ill. Admin. Code § 200.880. It further finds that the record shows that such a failure was not harmless. MG knew of the evidence prior to the deadline for direct testimony in the original proceedings, yet first asserted it in seeking rehearing. Due to this failure to comply with the Rules of Practice, and in construing the Rules so as to lower costs, to save time, and to avoid prejudicing those who act diligently and in good faith, the Commission finds that proceedings on rehearing were improper. 83 Ill. Admin. Code § 200.25. As such, this Commission need not proceed further. The Approved Route remains the approved routing in the area of Muirhead Springs Forest Preserve and Plato Center.

**IV. Restrictions on Forest Preserve Property**

A. ComEd Position

B. Staff Position

C. Petersdorfs' and Vogel's Position

The SP Parties point out that the deeds by which Robert Muirhead (the Father of intervenor Sarah Petersdorf) transferred much of the land which now comprises the Muirhead Springs Forest Preserve in 2003, including land over which either of the two alternative routing alternatives would cross, contained a significant, express restriction on the land's use. They noted that ComEd presented evidence that the inclusion in the original recorded deeds, and continued existence, of the restrictions<sup>1</sup> prevents ComEd from utilizing either of the two alternative routing adjustments.

In his Response Testimony, Michael Petersdorf aptly described the original deed restrictions and their continued effectiveness, as follows:

Although I am not an attorney, from the plain reading of the subject restrictions, I believe that (1) the restrictions do prohibit the FPDKC from allowing electric transmission lines on the subject parcels; (2) that the hand-drawn cross-outs of the restrictive language, which appear to have been done in mid-2014, were done with neither the knowledge nor consent of any of the persons or parties who deeded the parcels to the KCFPD; (3) the persons and parties that deeded those parcels received nothing in exchange for any purported elimination of the restrictions; and (4) the restrictions for all 3 deeds and parcels remain in effect.

Petersdorf Ex. 2.0 at 2:13-21.

The SP Parties also note that the record shows that neither Mr. Petersdorf nor his wife, Sarah, had any knowledge of the purported striking of the restrictions prior to them becoming known during the rehearing process. *Id.* at 3:30-32. Sarah is a Manager and Member of the legal entity, Muirhead Hui, LLC, that

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<sup>1</sup> [reference IDNR restrictions]

transferred one of the parcels in question to the FPDKC in 2003. *Id.* at 3:32-34; Tr. at 146:18-22 – 147:1-6, 152:13-15 (Feb. 19, 2015). If they were approached about consenting to a release of the restrictions, they would refuse to do so. Petersdorf Response Testimony (Reh’g), Petersdorf Ex. 2.0 at 3-4:39-49; Tr. at 153:1-6, 19-22, 154:1-22, 155:1-4 (Feb. 19, 2015). Good reason existed at the time of the restrictions and for their continued existence and effectiveness today. They were not arbitrary or unreasonable. Mr. Petersdorf testified that the property restrictions:

were an integral part of the property transfers, partly in order to protect our remaining acres and improvements, most importantly our Frank Lloyd Wright-designed Farm House. It seems inconsistent with the parcel transfers and the mission and purpose of the FPDKC, to now attempt to unwind part of the transfers in order to serve a different purpose that we do not understand.  
Petersdorf Ex. 2.0 at 3-4:44-49.

As further evidence of their position that the subject restrictions should not have been crossed out and the deeds re-recorded, during cross-examination of Mr. Petersdorf, counsel for ComEd elicited that counsel for the Petersdorfs recently sent a demand letter to counsel for the FPDKC concerning a release of the deed restrictions. Tr. at 155:5-22, 156:1-11.<sup>2</sup>

The record on rehearing amply demonstrates the absolute impediments the restrictions impose to routing a high voltage electric transmission line across land deeded to the FPDKC to which the restrictions attached and continue to apply. ComEd witnesses Mr. Naumann and Ms. Woods thoroughly explained why the restrictions, despite the attempted unilateral, unapproved striking

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<sup>2</sup> While an objection to the admission of the demand letter was sustained, no objection was made as to counsel for ComEd’s questions of the witness regarding the letter.



through hand-drawn cross-outs and re-recording of deeds, prevent ComEd from utilizing the parcels in question for its transmission line. Naumann Supp. Direct (Reh'g), ComEd Ex. 37.0 at 1-2:18-24, 3-4:51-77; Woods Supp. Direct (Reh'g), ComEd Ex. 38.0 CORR; Naumann Reb. (Reh'g), ComEd Ex. 39.0 at 1-2:16-30. Exhibits introduced during cross-examination further reinforced the evidence as to the continued effectiveness of the restrictions and the FPDKC's futile attempts to get the property grantors to release them. ComEd Group Cross Ex. 5 (data requests and responses describing, and providing copies of, communications between counsel to the FPDKC and counsel to the grantors). Indeed, if the FPDKC considered the restrictions to have been effectively and legally removed and rendered no longer effective, then we must question the necessity its efforts to get the property grantors to release the restrictions.

The SP Parties point out that any alleged statements, or non-statements, by any of the grantors concerning the restrictions may not be given legal effect due to the fact that the restrictive language contained in the deeds is clear and unequivocal, and may not thereby be negated by alleged extrinsic evidence. As the SP Parties state, the fact that the above-described deed restrictions imposed by the grantors were similar in wording to restrictions imposed by the IDNR does not detract from their legal effectiveness. It is enough that the grantor restrictions were an integral part of the deeds, applicable to the properties conveyed, were not released by the grantors, and by their terms would prohibit construction of the GPG transmission line on the properties. No one has suggested the restrictions

language is ambiguous; rather, everyone agrees that the language, if given effect, serves to prohibit a transmission line.

As the SP Parties argue, the principal function of a court in construing a written instrument is to give effect to the intention of the parties as expressed in the language of the document when read as a whole. Where the language is clear and definite, there is no need for judicial interpretation. *Sol K. Graff & Sons v. Leopold*, 92 Ill.App.3d 769, 416 N.E.2d 275, 277 (1<sup>st</sup> Dist. 1981) (provisions of a real estate lease prohibiting signs were not ambiguous). The grantor restrictions in the subject deeds are clear and definite.

The SP Parties also point out that MG also has not alleged the essential elements required for a reformation of the deeds. Specifically, Illinois law requires that, for a court to find reformation an appropriate remedy applicable to a written instrument, the party seeking reformation must prove by clear and convincing evidence that the parties had a clear and actual meeting of the minds which the written instrument does not accurately reflect. *LaSalle Nat'l Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 793 (1<sup>st</sup> Dist. 1987). MG has neither argued for reformation of the deeds nor alleged, let alone proved, facts sufficient to support such a remedy.

As the SP Parties further note, the three deeds in question and ancillary documents that were reproduced in ComEd Ex. 38.02 also contained restrictions on use imposed by IDNR, apparently as a condition of the grants to the FPDKC. See ComEd Ex. 38.02, pp. 7, 25, 39. The evidence shows, however, that when the IDNR released the FPDKC from utilizing the grant proceeds on the southern

portions of the properties, outside of the northern 200 acres, the IDNR did not release the southern properties from the use restrictions. Nothing in the letters from the FPDKC to the IDNR included a request for such relief, and nothing in the responding letters from the IDNR granted such a release. *Id.*, pp. 9-13, 27-31, 41-45. That is likely why ComEd witness Ms. Woods testified that the IDNR could still possibly enforce the IDNR-imposed restrictions. Woods Supp. Direct, ComEd Ex. 38.0 CORR., 4-5:104-105.

Lastly, the SP Parties countered MG's assertion that the Illinois Outdoor Recreation Grant Programs OSLAF/LWCF, 2014 Local Participation Manual ("Grant Manual"), serves to negate or render ineffective the grantor restrictions. In his cross examination of Ms. Meyers, counsel for Cash selectively picked out a single provision that states, "No land rights or reservations can be retained by the seller unless approved by the DNR." Cash Cross Ex. 3, p. 23. Neither the FPDKC nor MG offered the version of the Grant Manual in effect when the properties were conveyed and grants received, instead relying on a version that is ten years removed from the relevant time period. Even assuming, however, that the quoted provision also appeared in the version in effect ten years earlier, the provision does not render the grantor-imposed restrictions nullities or otherwise negate their effectiveness. When the local agency requesting a grant (*i.e.*, FPDKC) sends its billing request to DNR for grant reimbursement, the agency is to include a copy of the recorded deed. Cash Cross Ex. 3, p. 24; see *also Id.*, pp. 13, 14 (agency to provide commitment for title insurance or other

device that identifies property encumbrances; copy of property deed must be filed with DNR as part of the application).

Here, as the SP Parties point out, the restrictions language imposed by the grantors on two of the three properties in question was identical to that imposed by the IDNR. Also, presumably the IDNR saw, and it certainly had notice of, the grantor-imposed restrictions when the FPDKC provided the deeds. The record does not show whether the FPDKC provided a title commitment, so we cannot confirm that any title commitments at the time noted the grantor-imposed restrictions as exceptions. It is logical that the IDNR would have approved of the grantor-imposed restrictions, based on their similarity to those imposed by the IDNR itself. Nevertheless, the fact that the grantor-imposed restrictions were present and not released makes them effective today, even if, *arguendo*, they were in technical violation of a grant guideline. The remedy, if any, for such a technical violation, was to deny or require a return of the grant, and not to render the grantor-imposed restrictions no longer effective.

D. Muirhead Group Position

E. Commission Analysis and Conclusion

The Commission has carefully considered the testimony and other evidence pertaining to this issue. While we do not opine whether either the IDNR-imposed restrictions or the grantor-imposed restrictions on use remain effective, it is clear that considerable uncertainty exists that the restrictions are no longer effective. At best, one or more parties will be required to initiate legal

proceedings, with an uncertain time line and uncertain outcome. It is unreasonable for this Commission to make its order contingent, indeed held hostage, on such uncertainty. We declined to do so in the previous portion of this proceeding, and we will not do so here.

## **V. Route Of the Project**

- A. ComEd Position
- B. Staff Position
- C. Petersdorfs' and Vogel's Position

The SP Parties argue that the application of the twelve-factor analysis set forth in Docket 12-0598 necessarily leads to a conclusion that the Approved Route is the superior routing alternative in the vicinity of the Muirhead Springs Forest Preserve and Plato Center. *Ameren Illinois Transmission Co.*, Docket No. 12-0598, pp. 14-15 (Order, Aug. 20, 2013). The SP Parties assert that John Cash, and his group, are simply attempting to burden others by moving the transmission line from the Commission approved route to one that bisects a Forest Preserve and a town – the FPDKC Adjustment. SP Parties I.B., Reply Brief, p. 8. ComEd, giving its two-cents, submitted a Conditional Rehearing Alternative that avoids running through the middle of Plato Center, but still bisects the Forest Preserve ComEd Ex. 35.01.

The SP Parties argue that neither MG nor ComEd conducted sufficient investigations into the routing alternatives they put forth. Cash and MG did not undertake independent studies and utilized a non-expert for a halfhearted analysis. Tr. 122:9-11, 124:2-18, 126:2-5. The SP Parties further assert that

ComEd ceased using *de facto* standards in its analysis *Compare*, Tr. 278:12-279:9 to Murphy Dir. (Reh'g), ComEd Ex. 36.0, p. 5; see also, SP Cross Ex. 7.

Applying each of the twelve-factors, the SP Parties conclude that the analysis favors the Approved Route over both the FPDKC Adjustment and the ComEd Conditional Rehearing Alternative. The SP Party admits that the FPDKC Adjustment and ComEd Conditional Rehearing Alternatives are a sliver shorter and do parallel a railroad, and that the ComEd Conditional Rehearing Alternative affects a slightly lower number of parcels. However, the SP Parties argue that these factors, only slightly against the Approved Route, are more than outweighed by the other factors.<sup>3</sup>

The SP Parties submit that the record indicates that cost of construction savings for the FPDKC Adjustment or ComEd Conditional Rehearing Alternative are speculative at best, and unlikely to occur. ComEd, I.B. on Reh'g, p. 9. Even if there were some slight cost savings, the SP Parties argue that this Commission has found that impacts to homes is of greater importance, citing to, *In re Ill. Power Co. d/b/a Ameren IP & Ameren Ill. Transmission Co.*, Order, p. 16 Docket 06-0179 (May 16, 2007). Finally, the SP Parties argue that the Muirhead Group assertion that the FPDKC Adjustment being less complicated, intimating it to be less difficult to construct, is false. Due to need for inductive coordination studies and access issues, the SP Parties assert that ComEd's witnesses have

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<sup>3</sup> These factors do not include the historical impacts factor, which the SP Parties do not believe favors any particular routing. *Compare*, SP Parties' Initial Brief on Reh'g, p. 12 (historical Frank Lloyd Wright home) to MG Initial Brief on Reh'g, p. 7 (an archeological site that can be spanned).

suggesting constructing near a railroad is actually more difficult. Kaup, Dir., ComEd Ex. 6.0, ll. 220-222; Kaup, Tr., 127:18-19. As such the SP Parties submit that the difficulty and cost of construction factor, as a whole, falls in favor of the Approved Route. They further assert that the difficulty and cost of maintenance also favors the approved route for the same reasons regarding constructing near a railroad.

The SP Parties further assert that because the FPDKC Adjustment runs directly through a forest preserve, while the Approved Route does not touch a forest preserve, the environmental impact factor necessarily falls squarely in the Approved Route's favor. The SP Parties argue that even if the railroad corridor were to mitigate the impact, the impact certainly still exists, and is in excess of any environmental impact to commercial farming operations.

The SP Parties also argue that, by avoiding the Forest Preserve property, a town, a school, and several athletic fields, the Approved Route is superior to the FPDKC Adjustment.

As to the number of affected landowners, the SP Parties point out that this factor requires consideration of the number, not nature, of affected landowners. They accept ComEd's tallies, which show that the FPDKC Adjustment is inferior to the other routing alternatives with regard to this factor. Murphy Dir. (Reh'g), ComEd Ex. 36, p. 5.

Arguing that the impact to homes is of greater importance than cost of construction, the SP Parties point out that proximity to homes and other structures overwhelmingly favors utilization of the Approved Route. Nothing in

the record indicates that the single occupied home or single unoccupied home on parcels crossed by the Approved Route would be within 500 feet of the line. Tr. at 118:10-12. Dissimilarly, the ComEd Conditional Rehearing adds homes, and other structures, within five hundred feet. Petersdorf Dir. (Reh'g), Exh. 1.0, ll. 85-89; Vogel Dir. (Reh'g), Exh. 2.0, ll. 46-47. On top of those additional impacts, the FPDKC Adjustment adds 18 non-residential structures – not including numerous garages or shed – to the tally. Tr. 128:12. More importantly, the FPDKC Adjustment affects at least 15 more homes. Tr. 126:15-17.

The SP Parties also assert that the FPDKC Adjustment is disfavored as it impacts existing development by running through Plato Center. MG I.B. on Reh'g, p. 8. Conversely, no other routing alternative affects existing or planned development.

The SP Parties argue that only one person has participated in the proceedings on behalf of MG. Tr. 113:29-114:1. Unlike this non-involvement, several intervenors who favor the Approved Route have participated in these proceedings and non-party organizations have expressed concerns about utilizing the FPDKC Adjustment or ComEd Conditional Rehearing Alternative. Tr. 78:8-13.

Arguing that visual impact requires humans to see the transmission lines, the SP Parties assert that the Approved Route lays across on commercial farming land, unlike the alternatives that lay within the bounds of publicly accessed portions of a forest preserve, are visible to visitors of historic



residences, as well as, for the FPDKC Adjustment, all the residents and workers in Plato Center.

D. Muirhead Group Position

E. Commission Analysis and Conclusion

Upon consideration of the evidence and all relevant route selection criteria as described by the parties, the Commission finds that a balancing of the relevant criteria favors the Approved Route, the superior route in the area of Muirhead Springs Forest Preserve and Plato Center.

**VI. Findings and Orderings Paragraph**

Having considered the entire record herein and being fully advised on the premises, the Commission is of the opinion and finds that:

(1) The Route approved in ¶ 4 of the October 22, 2014 Order of this Commission is hereby re-affirmed as the superior routing alternative and approved;

(2) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that ComEd's Verified Petition is hereby granted, in accordance with the conclusions and findings set forth above.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this \_\_\_\_ day of \_\_\_\_\_, 2015.

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